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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELIJAH W., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	No. B241011 (Super. Ct. No. GJ29441)

ORIGINAL PROCEEDINGS in mandate. Robert Leventer, Juvenile Court Referee. Petition granted.

Ronald L. Brown, Public Defender, Albert J. Menaster, Lara Kislinger and Megan N. Gallow, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Steve Cooley, District Attorney, Roberta Schwartz and Cassandra Hart, Deputy District Attorneys, for Real Party in Interest.

Elijah W., a minor, (hereinafter referred to as petitioner) filed a petition for writ of mandate after the trial court denied his motion to have Dr. Catherine Scarf appointed as a defense expert. We issued an Order to Show Cause on June 5, 2012. After considering the petition, the return filed by the People, the traverse filed by petitioner and all documents filed in support thereof, we conclude the superior court abused its discretion in denying petitioner's motion and grant the petition.

FACTUAL & PROCEDURAL BACKGROUND

On December 28, 2011, a wardship petition under Penal Code section 602 was filed alleging petitioner had committed one count of arson of a structure or forest (Pen. Code, § 451, subd. (c)) and one count of recklessly causing a fire of a structure or forest (Pen. Code, § 452, subd. (c)).

On March 6, 2012, petitioner, represented by the Public Defender's office, filed a motion requesting the appointment of Dr. Catherine Scarf as an expert witness "to assist counsel in conducting reasonably necessary psychological evaluations, assessments and other activities related to the presentation of the case." Dr. Scarf was not a member of the panel of psychologists or psychiatrists selected for the Juvenile Competency Pilot Program in the Pasadena juvenile courts (the JCST panel). The JCST panel had been selected in accordance with a protocol developed by the Los Angeles County Superior Court to implement Welfare and Institutions Code section 709 for the Los Angeles County Juvenile Court system .

The "Amended Competency to Stand Trial Protocol" submitted by petitioner, dated January 9, 2012 (the Protocol), provides in pertinent part: "If the court finds substantial evidence raises a doubt as to the minor's competency the court shall suspend proceedings. If the court suspends proceedings, or grants minor's request for a CST [competency to stand trial] evaluation, it shall appoint an expert from the Juvenile Competency to Stand Trial Panel (JCST Panel) under Evidence Code §730 to perform a CST evaluation. The JCST Panel shall consist of experts in child and adolescent development, who have training in the forensic evaluation of juveniles, and are familiar with the competency standards and accepted criteria used in evaluating competence.[Fn.

omitted.] The Juvenile Court shall maintain a list of approved JCST Panel evaluators and appointments will be made from that list on a rotating basis."

Welfare and Institutions Code section 709, enacted in 2010 (2010 ch. 671 (AB 2212, § 1)) provides that if a court expresses a doubt as to a minor's competency to stand trial, it shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. "The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and criteria used in evaluating competence. The Judicial Council shall develop and adopt rules for the implementation of these requirements." (Welf. & Inst. Code, § 709.)

Evidence Code section 730 provides: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

Petitioner's counsel filed a declaration in support of this motion in which she stated that she had telephoned the five experts on the JCST panel to determine their positions regarding the confidentiality of information they obtained during the assessment for competency process. She specifically asked each panelist's position on information regarding child abuse or neglect, or threats made to others. All of the panelists told her they would have to report to law enforcement or child welfare authorities any information of child abuse or threats pursuant to *Tarasoff v. Regents of California* (1976) 17 Cal.3d 425 (*Tarasoff*) despite any attorney-client privilege. When counsel spoke with Dr. Scarf, Dr. Scarf indicated that she would only report any information of child abuse and/or neglect or threat to the "appointing attorney."

The juvenile court denied the motion with a lengthy written opinion. It stated, inter alia, "The confidentiality issue, in the court's opinion, is merely academic. In the

hundreds of [Evidence Code] §730 appointments that this court has granted, and in the thousands that have been granted by the juvenile and adult courts, this issue has never been raised. Nor, has there ever been a case brought to the court's attention where a minor has divulged child abuse or made a threat to commit a crime during a competency evaluation and the statement was later introduced in court or even prompted a report. The likelihood of this occurrence is remote because the focus of a competency evaluation is the functional ability of a minor to understand the court process. [Fn. omitted.] Unlike other evaluations, a minor's culpability or remorse is not an issue in a competency evaluation. [Fns. omitted.] [¶] The unlikelihood of this occurrence is even more remote because the focus of a competency evaluation is the functional ability of a minor to understand the court process. [Fn. omitted.] . . . [¶¶] The protocol sets up a separate panel of exceptionally qualified experts to do all [Evidence Code] §730 juvenile competency testing in the first instance. [Fn. omitted.] The protocol allows for the defense to obtain an assessment and not to disclose it unless and until a doubt is declared. The protocol allows for additional competency assessments upon a showing of good cause. The protocol does not preclude any party from obtaining further testing without court funding. . . . [¶¶] The court believes that [Welfare and Institutions Code] §709 is a fair and proper way to investigate and adjudicate juvenile competency issues. The protocol implements § 709 and affords minors added protections. Moreover, the court does not believe that utilizing the protocol impermissibly interferes with the attorney-client privilege."

In his petition, petitioner contends that the Protocol violates his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the U.S. Constitution because it does not allow for experts to be appointed pursuant to Evidence Code section 952 and because it forces minors represented by court-appointed counsel to engage experts who will not abide by the attorney-client privilege with respect to disclosure of child abuse, child neglect and/or *Tarasoff* threats.

DISCUSSION

I. Background

a. The Protocol

The Protocol specifically indicates its purpose is to implement Welfare and Institutions Code section 709 (when a trial court expresses a doubt as to minor's competency to stand trial), but calls for the appointment of a psychotherapist under Evidence Code section 730 (appointment of an expert to testify at trial).

The Protocol provides that: "No statements, admissions, or confessions made by, or incriminating information obtained from, a minor in the courts of a [juvenile competency to stand trial] evaluation shall be admitted into evidence or used against the minor in any juvenile, criminal, or civil proceeding." It also provides that the court may order that the results of the evaluation do not need to be disclosed to the court or district attorney until and unless a doubt as to competency is expressed.

b. Petitioner's Arguments

Here, petitioner's motion states that it is made pursuant to Evidence Code sections 730 and 952 for the appointment of Dr. Scarf "as [an] expert witness . . . to assist counsel in conducting reasonably necessary psychological evaluations, assessments, and other activities related to the presentation of the case. The expert is to make available all findings and reports to the defense only, to consult confidentially with defense counsel, and to testify, if necessary, at the adjudication or other pertinent proceedings in this case."

The motion does not make any mention of Welfare and Institutions Code section 709. There is nothing in the record reflecting the court's expression of doubt as to petitioner's competency to stand trial.

One of the declarations submitted in support of the motion states: "Elijah is ten years old and in fourth grade. In my interactions with him he has been very quiet, barely answering questions, and is clearly very anxious and stressed about this process, and nothing I say seems to help. [¶] Given his age and our minimal communication, I have serious concerns regarding whether he can fully understand these proceedings and

cooperate rationally with counsel. Counsel is aware of the high rate of developmental immaturity with younger juveniles in court and it would be ineffective assistance of counsel if counsel did not appoint an expert to evaluate how Elijah's age impacts his ability to comprehend the proceedings and participate in his defense."

Petitioner requests we take judicial notice of the fact that Dr. Scarf was on the Superior Court of Los Angeles County Approved Panel of Psychiatrists & Psychologists. This is not the JCST panel which is approved by the juvenile court for these types of motions.

Petitioner argues in his petition that the Protocol violates the rules on attorney-client privilege by requiring a defendant to submit to an examination by one of the JCST panel doctors, presumably because the panel doctors do not believe in maintaining the attorney-client privilege. Petitioner also contends that the Protocol violates the attorney-client privilege because it does not allow for experts to be appointed pursuant to Evidence Code section 952. Petitioner's position is that the attorney-client privilege should protect all disclosures made by petitioner in an examination by a panel doctor.

Although petitioner's motion clearly seeks the appointment of the expert to assist counsel in the preparation of the defense, it is unclear from the declaration submitted by counsel whether petitioner is also seeking a psychotherapist for a competency (CST) examination. The Protocol is only implicated if a CST evaluation is involved. The record submitted to us does not indicate the proceedings have reached that stage. To the extent that petitioner is only seeking the appointment for assistance in the defense and not to evaluate petitioner's competence to stand trial, we find that he is entitled to the appointment of Dr. Scarf and is not limited to a psychotherapist from the JCST panel.

To the extent that petitioner is making a request for a CST evaluation, we hold, for the reasons below, that the attorney-client privilege applies to any disclosure made in conjunction with that evaluation. In reaching that conclusion, we examine both the psychotherapist-patient privilege and the attorney client-privilege.

c. The psychotherapist-patient privilege

A patient has a privilege to refuse to disclose and to prevent another from disclosing, a confidential communication made to a psychotherapist. (Evid. Code, § 1014.)~

"The psychotherapist-patient privilege is a statutory privilege that applies in both civil and criminal cases. [Citations.] . . . [¶] [F]or policy reasons the psychotherapist-patient privilege is broadly construed in favor of the patient, while exceptions to the privilege are narrowly construed. [Citation.] The privilege is also considered 'paramount to prosecution,' generally outweighing the People's interest in successful prosecutions and their right to due process of law under article I, section 28, subdivision (d) of the California Constitution. [Citation.] [¶] Despite its broad and protective nature, the psychotherapist-patient privilege is not absolute. [Citation.] Upon a proper showing, the records of psychotherapy may be disclosed in litigation, Where the psychotherapist-patient privilege is claimed as a bar to disclosure, the claimant has the initial burden of proving the preliminary facts to show the privilege applies. [Citation.] . . . [¶] Once the claimant establishes the preliminary facts of a psychotherapist-patient relationship, the burden of proof shifts to the opponent of the privilege. . . . [T]he opponent of the privilege may show that . . . the material sought falls within one of the exceptions to the psychotherapist-privilege codified at sections 1016 though 1027." (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014-1015.)

There is an exception to the privilege "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (Evid. Code, § 1024.)

Another exception to the privilege is contained in Evidence Code section 1017, subdivision (a), which provides: "There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, *but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the*

lawyer with information needed so that he or she may advise the defendant whether to enter or withdraw a plea based on insanity or to present a defense based on his or her mental or emotional condition." "[S]uch information is also protected from disclosure by the attorney-client privilege. [¶] However, once the patient places his mental or emotional condition in issue, as for example by pleading not guilty by reason of insanity, the information so provided by the psychotherapist to the attorney is no longer protected from disclosure by the psychotherapist patient privilege. (§ 1016.)" (*People v. Lines* (1975) 13 Cal.3d 500, 511-12.)

The Child Abuse and Neglect Reporting Act (Pen. Code, §§ 11164, et seq.) provides that any doctor, psychologist, clinical social worker, nurse or clinical counselor must report any knowledge or reasonable suspicion of child abuse or neglect discovered in a professional capacity. The punishment for a mandated reporter's failure to report is a term not to exceed one year in county jail and/or a fine of not more than $5,000. (Pen. Code, § 11166.01, subd. (b).)

Penal Code section 11165.7 defines a "mandated reporter" to include, inter alia, employees at schools or day care facilities, social workers, and police. It does not include attorneys, but includes "a district attorney investigator, inspector, or local child support agency caseworker; unless the investigator, inspector, or caseworker is working with an attorney appointed pursuant to Section 317 of the Welfare and Institutions Code to represent a minor."[1]

An exception to the psychotherapist-patient privilege was recognized under common law in *Tarasoff, supra*, 17 Cal.3d 425. In *Tarasoff*, a patient told his psychologist of his intention to kill his ex-girlfriend. The Supreme Court held that notwithstanding the professional duty to maintain confidentiality, when a therapist

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[1] Welfare and Institutions Code section 317 provides for the appointment of counsel for indigent parents or guardians for wards or dependents of the juvenile court. Subdivision (f) of that section provides that the child or counsel of the child may invoke the psychotherapist-client privilege. "Counsel shall be the holder of these privileges if the child is found by the court not to be of sufficient age and maturity to consent."

determines that a patient presents a serious danger of violence to another, the therapist has an obligation to take reasonable steps to protect the intended victim against such danger. (*Id*. at p. 431.)

d. The attorney-client privilege

Pursuant to Evidence Code section 952, the attorney-client privilege may be claimed for "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Business and Professions Code section 6068, subdivision (e)(1) provides that it is the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Rules of Professional Conduct, rule 3-100, subdivision (A) provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068 subdivision (e)(1) without the informed consent of the client. . . ."

Evidence Code section 956.5 provides a "dangerous patient" exception to the attorney-client privilege. It provides that there is no attorney-client privilege "if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual."

People v. Dang (2001) 93 Cal.App.4th 1293 noted a possible conflict between Evidence Code section 956.5 and Business and Professions Code section 6068, subdivision (e) which requires an attorney to "maintain inviolate the confidence and at every peril to himself or herself to preserve the secrets, of his or her client." *Dang* held, however, that an attorney could testify about threats made by his client, the defendant in a criminal case, over the defendant's objections. (*Id.* at pp. 1297-1299.) The rule of

Evidence Code section 956.5, however, is one addressed to the admissibility of evidence, not to the duty of disclosure.

e. The trial court's ruling

The trial court concluded that there would be no harm in appointing a panel expert because "the confidentiality issue is academic." It reasoned that the odds of petitioner saying something incriminating to a therapist is remote because the issue had never been raised before and because the competency evaluation has a limited focus. However, we cannot conclude petitioner will not say something incriminating just because it has never happened before. It is quite possible that petitioner, a minor, can and will say something during a psychotherapy examination, and then it will be too late to unring the bell.

II. Is Petitioner entitled to the appointment of Dr. Scarf?

a. Constitutional right to counsel

We begin with petitioner's first assertion that the Protocol violates his right to effective assistance of counsel under the 6th and 14th Amendments to the United States Constitution.

The right to effective assistance of counsel guaranteed by both the federal and state Constitutions also includes the right to reasonable ancillary services necessary for the preparation of a defense. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.)

"The right to counsel includes the right to use of experts such as psychiatrists or psychologists or any other expert that will assist counsel in preparing a defense. (*In re Ketchel* (1968) 68 Cal.2d 397, *In re Ochse* (1951) 38 Cal.2d 230.) This right to assistance also includes the right to have any communications made to experts remain confidential. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227; *People v. Lines* (1975) 13 Cal.3d 500.) . . . . Although there is no statute that specifically covers the appointment of an expert for the defense other than for the purposes of an insanity plea (see Evid. Code, §§ 1016, 1017) there can be no question that equal protection demands that in a proper factual situation a court must appoint an expert that is needed to

assist an indigent defendant in his defense. [Citations.]" (*Torres v. Municipal Court* (1975) 50 Cal.App.3d 778, 783-785.)

"'The attorney client privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evid. Code, § 954.) That privilege encompasses confidential communications between a client and experts retained by the defense.' (*People v. Coddington* (2000) 23 Cal.4th 529, 605, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 . . . .)" (*People v. Roldan* (2005) 35 Cal.4th 646, 724, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.)

In this case, the therapist petitioner seeks to hire, Dr. Scarf, would be assisting defense counsel, not unlike a translator or other expert witness. The attorney-client privilege would therefore extend to any disclosures made by petitioner to a psychotherapist on the defense "team."

The conclusions of the therapists on the JCST panel that they would be compelled to reveal any disclosures made by petitioner are therefore incorrect. In this situation, as experts appointed to aid the defense, they are bound by the attorney-client privilege. Dr. Scarf's position that she only need report information about child abuse or neglect or threats of violence to petitioner's attorney is correct.

This conclusion is not at odds with *Tarasoff*, since in that case, the therapist was hired for therapeutic purposes, and was not a therapist hired to assist defense counsel. (*Tarasoff, supra*, 17 Cal.3d at p. 432.)

Nor is this conclusion at odds with Evidence Code section 956.5, which, as we noted above, addresses the admissibility of evidence, not the duty to disclose. In addition, section 956.5 gives the attorney the discretion to disclose. It does not provide that a psychotherapist assisting the attorney is required to disclose any threats of harm to law enforcement or child welfare authorities.

b. The Tarasoff duty is a civil liability issue

Petitioner seeks a therapist who does not feel constrained by *Tarasoff* to keep information confidential. *Tarasoff*, however, arises in the context of negligence in a civil

liability case. (*Tarasoff, supra,* 17 Cal.3d at p. 431.) The duty of a therapist to disclose communications arises when the patient may be dangerous to himself or to another person. But the *Tarasoff* duty imposed on a therapist is for the benefit of a potential victim and it is the victim of any harm caused by the patient who has a cause of action against a therapist. (*Ibid*.) *Tarasoff* does not apply to the situation here, where an attorney seeks the assistance of a psychotherapist in the defense of a juvenile delinquincy proceeding.

c. Constitutionality of the Protocol

Petitioner seeks to dissolve the panel or declare the Protocol invalid. We need not do so if what he seeks is the appointment of Dr. Scarf to assist counsel because the Protocol is not implicated.

Even if petitioner seeks an evaluation of competency to stand trial, it is not provisions of the Protocol which the JCST panel therapists invoke. Therefore we do not need to reach the issue of the constitutional validity of the Protocol.

DISPOSITION

Let a writ of mandate issue directing the trial court to vacate and set aside its order denying the motion to appoint Dr. Scarf and to enter a new and different order appointing Dr. Scarf to assist defense counsel as an expert witness and ordering that any disclosures made to Dr. Scarf in this capacity be protected under the attorney-client privilege. We do not rule on the constitutionality of the Protocol or otherwise find it results in a breach of the duty of attorney-client confidentiality.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**